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In The

Supreme Court of the United States

October Term, 1995

ELIZABETH NOBLE, WILLIAM P. NOBLE and BONNIE HYNOSKI,

Petitioners,

vs.

COLUMBIA COUNTY REDEVELOPMENT AUTHORITY,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

I. Whether a public authority of a state legislatively delegated by a state with the power to take by the right of eminent domain blighted private property, may act beyond the scope of the legislation granting it the right to condemn without the specific approval of the legislature to do so based upon a contract between it and a Department of the Executive Branch of that state which is legislatively vested with different eminent domain powers; and if said action violates the principle of separation of powers.

II. Whether condemnees' rights under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Pennsylvania Constitution have been violated when they were denied an evidentiary hearing to establish that the reasons for the taking of their property no longer exists and that, constitutionally and statutorily requisite security is not available to ensure the payment of just compensation for the taking.

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OPINIONS BELOW

The opinion of the trial court (App., *infra*, 12a-22a) is unreported. The opinion of the Commonwealth Court of Pennsylvania (App., *infra*, 2a-11a) is reported at 658 A.2d 481. The order of the Supreme Court of Pennsylvania (App., *infra*, 1a) is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania on September 27, 1995 issued an order denying the Petition for Allowance of Appeal which the Petitioners had duly filed. (App., *infra*, 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (Emphasis supplied).

United States Constitution, Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis supplied).

Constitution of the Commonwealth of Pennsylvania

Article 1

SECTION 10. Initiation of criminal proceedings; twice in jeopardy; *eminent domain*.

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law. No person shall, for the same offense, be twice put in jeopardy of life or limb; *nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.* (Emphasis supplied).

Pennsylvania Eminent Domain Code — 26 P.S. § 1-403, Security required

(a) *Bond.* Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of

which shall be that the condemnor shall pay such damages as shall be determined by law.

(b) *Power of taxation.* Where a condemner has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

(c) *Insufficient Security.* The court, upon preliminary objections of the condemnee under and within the time set forth in section 406(a),[1] may require the condemner to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

Pennsylvania Eminent Domain Code — 26 P.S. § 1-403, Preliminary Objections

(a) Within thirty days after being served with notice of condemnation, the condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemner; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

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1. Section 1-406 of this title.

Pennsylvania Urban Redevelopment Law — 35 P.S. § 1702, Findings and Declaration of Policy

It is hereby determined and declared as a matter of legislative finding —

(a) That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or over-crowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses.

(b) That such conditions or a combination of some or all of them have and will continue to result in making such areas economic or social liabilities, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values.

(c) That the foregoing conditions are beyond remedy or control by regulatory processes in certain blighted areas, or portions thereof, and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted, and that such conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance., replanning and redevelopment is difficult and impossible without the effective public power of eminent domain.

(c.1) That certain blighted areas, or portions thereof, may require total acquisition, clearance and disposition, subject to continuing controls as provided in this act, since the prevailing condition of decay may make impracticable the reclamation of the area by rehabilitation or conservation, and that other blighted areas, or portion thereof, through the means provided in this act, may be susceptible to rehabilitation or conservation or a combination of clearance and disposition and rehabilitation or conservation in such manner that the conditions and evils hereinbefore enumerated may be eliminated or remedied.

(d) That the replanning and redevelopment of such areas in accordance with sound and approved plans for their development will promote the public health, safety, convenience and welfare.

(e) That there exist within the Commonwealth both within and outside of certified redevelopment areas, properties which have become derelict, abandoned or unfit for human habitation or other use by reasons of age, obsolescence, prolonged vacancy, dilapidation, deterioration, lack of maintenance and care or general neglect.

(f) That such derelict properties individually and collectively constitute a blight and nuisance in the neighborhood; create fire and health hazards; are used for immoral and criminal purposes; constitute unreasonable interferences with the reasonable and lawful use and enjoyment of other premises in the neighborhood; are harmful to the social and economic well-being of any municipality; depreciate property values; and generally, jeopardize the health, safety and welfare of the public.

(g) That there exists a serious shortage of decent, safe or sanitary housing accommodations and for related usages, and that the acquisition of blighted properties for residential and related uses, by eminent domain is a proper public purpose which will promote public health, safety and welfare.

(h) That there exists within the Commonwealth, both within and outside certified redevelopment areas, an inadequate supply of residential owner-occupied and rental housing due, in part, to the deterioration of older dwellings, the elimination of substandard dwellings by governmental action, the increased cost of construction and the unavailability of affordable financing from the private sector.

(i) That there exists within the Commonwealth, both within and outside certified redevelopment areas, deteriorating commercial and industrial areas and/or individual structures, due, in part, to the fact that there are no private funds available to finance the purchase, construction, rehabilitation, demolition or equipping of the commercial and industrial properties at interest rates that would make the commercial or industrial project economically feasible. Such commercial or industrial projects are needed for the social and economic well-being of communities within the field of operation of authorities.

Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the health, safety and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as Redevelopment Authorities, which shall exist and operate for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such areas, as provided by this act, in

conformity with the comprehensive general plan of their respective municipalities for residential, recreational, commercial, industrial, or other purposes, and otherwise encouraging the provision of healthful homes, decent living environment, and adequate places of employment of the people of this Commonwealth. Such purposes are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

Pennsylvania Urban Redevelopment Law — 35 P.S. §1709, Powers of An Authority

An Authority shall constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof, which powers shall include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this act, including the following powers in addition to those herein otherwise granted:

* * *

(i) To acquire by eminent domain any real property, including improvements and fixtures for the public purposes set forth in this act, in the manner hereinafter provided, except real property located outside a redevelopment area;

Pennsylvania Urban Redevelopment Law — 35 P.S. § 1712, Eminent Domain

Title to any property acquired by an Authority through eminent domain shall be an absolute or fee simple title, unless a lesser title shall be designated in the eminent domain proceedings. The Authority may exercise the right of eminent

domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such Authority is organized to operate. If any of the real property in the redevelopment area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may, nevertheless, be acquired by condemnation: Provided, that no real property belonging to a city, county or to the Commonwealth may be acquired without its consent. No real property belonging to a public utility corporation may be acquired without the approval of the Public Utility Commission.

Pennsylvania Urban Redevelopment Law — 35 P.S. § 1712.1, Blighted Property Removal

(a) Notwithstanding any other provision of this act, any Redevelopment Authority shall have the power to acquire by purchase, gift, bequest, eminent domain or otherwise, any *blighted property* as defined in this section, either within or outside of a certified redevelopment area and, further, shall have the power to hold, clear, manage and/or dispose of said property for residential and related reuse and commercial or industrial reuse. This power shall be exercised in accord with the procedures set forth in this section. (Emphasis supplied).

Pennsylvania Urban Redevelopment Law — 35 P.S. § 1712.1(c)(1)-(8), Blighted Property Shall Include:

(1) Any premises which because of physical condition or use is regarded as a public nuisance at common law or has been declared a public nuisance in accordance with the local housing, building, plumbing, fire and related codes.

(2) Any premises which because of physical condition, use or occupancy is considered an attractive nuisance to children,

including but not limited to abandoned wells, shafts, basements, excavations, and unsafe fences or structures.

(3) Any dwelling which because it is dilapidated, unsanitary., unsafe, vermin-infested or lacking in the facilities and equipment required by the housing code of the municipality, has been designated by the department responsible for enforcement of the code as unfit for human habitation.

(4) Any structure which is a fire hazard, or is otherwise dangerous to the safety of persons or property.

(5) Any structure from which the utilities, plumbing, heating, sewerage or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.

(6) Any vacant or unimproved lot or parcel of ground in a predominantly built-up-neighborhood, which by reason of neglect or lack of maintenance has become a place for accumulation of trash and debris, or a haven for rodents or other vermin.

(7) Any unoccupied property which has been tax delinquent for a period of two years prior to the effective date of this act, and those in the future having a two year tax delinquency.

(8) Any property which is vacant but not tax delinquent, which has not been rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate code enforcement agency.

Pennsylvania State Planning Code — 71 P.S. § 1049.3a, Powers and Duties of the Department of Community Affairs

The Department of Community Affairs shall have the power to:

(1) Cooperate with county, municipal and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, and similar agencies created for the purposes of aiding and encouraging an orderly productive and coordinated development of the State, and encourage and assist in their creation; and also, to cooperate with planning boards and similar bodies of other states and of the Federal government in formulating comprehensive regional plans and in the solution of regional problems. The department also shall cooperate with and enlist the support of civic bodies, corporations and individuals in the attainment of these and similar objectives.

(2) Study housing conditions and needs throughout the Commonwealth and devise ways and means of eliminating conditions of bad housing, such as slums or unsafe, unsanitary, inadequate, or overcrowded dwellings, or a combination of these conditions, accompanied and aggravated by an acute shortage of decent, safe and sanitary dwellings, and of securing economies in the construction or renovation of dwellings so that additional safe and sanitary houses may become available.

(3) Collect or develop and distribute information relating to housing, to improved methods of construction, planning and financing of housing, to the administration of public housing authorities, and to the construction, maintenance and operation of projects by such authorities.

(4) Suggest and assist in the preparation of legislation relating to housing conditions and needs, building codes, health and sanitation standards, and advise and assist municipalities in the formulation of ordinances relating thereto.

(5) Develop, administer or assist in the administration of any State program for the providing of housing.

(6) Exercise such jurisdiction and powers of supervision over housing authorities and their projects and redevelopment authorities and their projects as provided for in this act or as otherwise prescribed by law.

(7) Encourage, approve, supervise and control the organization and operation of limited dividend housing companies and their projects.

(8) Recommend or approve areas, which areas may be within, adjacent to, or separate and apart from, areas of bad housing, as designated by the department, within which the development of housing projects by limited dividend housing companies may be undertaken.

(9) Cooperate with local or regional housing officials, agencies or authorities, as well as with those of other states and of the Federal government.

(10) Promulgate rules and regulations to enforce and effectuate the purposes of this act.

Pennsylvania State Planning Code — 71 P.S. §1049.4, Eminent Domain

The Department of Community Affairs shall have the power, in the name of the Commonwealth, to exercise the right of

eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such department has approved the initiation of a project. Title to any property acquired by the department through eminent domain shall be an absolute or fee simple title unless a lesser title shall be designated in the eminent domain proceedings. If any of the real property in the area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may nevertheless be acquired by condemnation: Provided, That no real property belonging to a city, county, borough, town or township, or to the Commonwealth, may be acquired without its consent. No real property belonging to a public utility corporation may be acquired without the approval of the Pennsylvania Public Utility Commission.

STATEMENT OF THE CASE

This is an eminent domain case involving a residential property in Centralia, Columbia County, Pennsylvania, a town that has for more than 40 years received much notoriety for its underground mine fire. In 1983, federal funds were appropriated and contracted to be supplied to Pennsylvania to alleviate the distress and hardship caused to the residents of Centralia, a borough in Pennsylvania, by reason of an underground mine fire. The Commonwealth's Department of Community Affairs ("DCA") was the entity that contracted with the federal government. The DCA then contracted with the Columbia County Redevelopment Authority ("CCRA") to administer and effectuate the federal appropriation. In 1993, a declaration of taking was filed by the CCRA as an agent of the DCA pursuant to the contract between DCA and CCRA to condemn petitioners' ownership of the surface estate of the subject property .[2]

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2. The subsurface containing the fuel for the claimed underground fire was not condemned.

The declaration of taking identified the Commonwealth of Pennsylvania as the condemnor, but it was not executed by the Commonwealth or its counsel. The condemner, in fact and in law, is solely CCRA and the Commonwealth of Pennsylvania's liability is only pursuant to the terms of its contract with the CCRA. The contract between DCA and CCRA provided, *inter alia*, that:

> . . . WHEREAS, under the provisions of the federal Appropriations Act of 1984, P.L. 98-181 [HR 3959], 97 Stat. 1153, 1294 (1983) funds are available for the acquisition of private homes, businesses and non-profit buildings and for the relocation of people in the Borough of Centralia and portions of Conyngham Township, Columbia County, *which properties are threatened by an underground mine fire* . . .

(Emphasis added). While the declaration of taking filed by the CCRA averred that just compensation had been "secured by the Commonwealth's power of taxation," the declaration of taking was executed solely by CCRA. The Condemnees filed preliminary objections to the declaration of taking attacking the condemnation and averring *inter alia*, that:

> 1. The Declaration of Taking filed in this case and the condemnation sought to be effected thereby are void because the Authority, as the agent of the Commonwealth, is acting *ultra vires* of the powers vested in its pursuant to and in accordance with 35 Pa. C.S.A. § 1701 *et seq.*
>
> 2. The Declaration of Taking filed in this case and the condemnation sought to be effected thereby are void because they constitute a taking of property without due

process of law and without proper security first being made in violation of the United States Constitution.

3. The Declaration of Taking filed in this case and the condemnation sought to be effected thereby are void because they constitute a taking of property without proper security first being made in violation of the Eminent Domain Code of Pennsylvania, as amended, and the Pennsylvania Constitution.

In its response to the preliminary objections, CCRA admitted that there had not been any determination of blight and that it did not have the power to levy and collect taxes.[3]

The Court of Common Pleas of Columbia County, Pennsylvania heard argument on the preliminary objections. Counsel for the condemnees requested but was denied an evidentiary hearing to resolve the factual issues raised by the preliminary objections. By Order dated February 15, 1994, the trial court denied the preliminary objections. An appeal to the Commonwealth Court followed. By Opinion and Order dated April 28, 1995, a panel that Court affirmed the trial court's decision and held that a local redevelopment authority created pursuant to the Urban Redevelopment Law of Pennsylvania need not comply with statutorily mandated prerequisites for condemnation when it condemns, as here, on behalf of the state and that despite the fact that the condemnees had averred in their preliminary objections that the taking was ultra vires and that just compensation to the petitioners had not been secured, an evidentiary hearing was not required.

A Petition for Allowance of Appeal was then filed with the Supreme Court of Pennsylvania. On September 27, 1995, the

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3. The Authority also filed an Amended Answer to the preliminary objections containing the same admissions.

Supreme Court of Pennsylvania denied the petition for allowance of appeal.

REASONS FOR GRANTING THE WRIT

The power of government to take property by eminent domain, next to the power to inflict capital punishment, is the most awesome grant of power under the law of the land and cannot be exercised without strict authority of law and payment of just compensation. State courts are notoriously unaware of the intricacies of law governing the constitutional limitations on the exercise of the right of eminent domain and the need for guidance from the Court is acute. This case is a timely and rare opportunity to provide guidance to the Pennsylvania courts and the courts of all 50 states on the strict constitutional constraints under which the awesome power of eminent domain can be exercised. The decisions of the Supreme Court of Pennsylvania, its Commonwealth Court and the trial court are erroneous. The issues here presented and addressed are therefore important.

I.

THE COLUMBIA COUNTY PENNSYLVANIA REDEVELOPMENT AUTHORITY ACTED BEYOND THE SCOPE OF ITS LEGISLATIVELY VESTED AUTHORITY BY CONDEMNING THE PROPERTY IN QUESTION; IT CANNOT BE VESTED WITH BROADER POWERS OF EMINENT DOMAIN PURSUANT TO A CONTRACT WITH THE PENNSYLVANIA DEPARTMENT OF COMMUNITY AFFAIRS.

The power of eminent domain may only be delegated by the legislature, not solely by the executive branch of government. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 597 (1952); *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir.

1985). The power of eminent domain by other than the sovereign itself arises only when legislative action points out the occasion, modes and agencies for its exercise. *In re Legislative Route 1018, Section 4, Lower Chichester Township, Delaware County*, 222 A.2d 906 (Pa. 1966).

The Pennsylvania Legislature vested the DCA with the right of eminent domain. The DCA has " . . . the power, in the name of the Commonwealth to exercise the right of eminent domain in the manner provided by law . . .", 71 P.S. §1049.4, but only within the ambit of the purposes for which it was created. Similarly, Redevelopment Authorities in Pennsylvania, such as CCRA, have been vested with the right of eminent domain but only pursuant to 35 P.S. § 1712 which provides that a " . . . Redevelopment Authority shall have the power to acquire by . . . eminent domain . . . *blighted property*." 35 P.S. §1712.1(a). (Emphasis supplied).

In this case, the Pennsylvania courts have held that although the CCRA was created pursuant to the Pennsylvania Urban Redevelopment law which authorizes an authority to only acquire property in an area duly certified to be blighted, it can by contract assume the right of eminent domain for purposes other than that for which it was created. (App., *infra*, 7a and 16a). In this case, while it was conceded that there was no certification of blight filed concerning the subject property or the area in which it is situated, (App., *infra*, 7a), the Pennsylvania courts held that the CCRA was vested with the DCA's broader eminent domain powers pursuant to the contract between the two entities. (App., *infra*, 7a and 15a).

The Pennsylvania courts based their holdings on 35 P.S. § 1709(i) which provides that a Redevelopment Authority, such as the CCRA, can act as an agent of the Commonwealth of Pennsylvania and take property pursuant to the DCA's broader

powers of eminent domain. As interpreted, § 1709(i) is unconstitutional, in that it permits the DCA, a state agency and an arm of the executive branch of Pennsylvania government, to vest the CCRA, a governmental authority, with broader eminent domain powers than those with which DCA was vested by the Pennsylvania legislature.

While there are no constitutional restraints that would proscribe a redevelopment authority to act as an agent of the Commonwealth *per se*, there are constitutional limitations to eminent domain powers that can be delegated by contract by the DCA to the CCRA without express legislative action. The delegation of eminent domain powers to the CCRA by DCA which are broader than those granted to it by the legislature not only violates Pennsylvania law, but also the Pennsylvania and United States Constitutions.

The power to condemn must be strictly construed, *In re 203.76 Acres of Land in Franklin Township, Beaver County*, 245 A.2d 451 (Pa. 1968), in order to guard against the unauthorized use or extension of condemnation powers. *Avery v. Commonwealth of Pennsylvania*, 276 A.2d 843 (Pa. Cmwlth. 1971).

Pennsylvania has vested the DCA with the right of eminent domain, 71 P.S. § 1409.4, but only within the ambit of the purposes for which that department was created. 71 P.S. § 1049.3a. Similarly, while the CCRA as an urban redevelopment authority created pursuant to the Urban Redevelopment Law of Pennsylvania has the right to take private property, 35 P.S. § 1712.1a, it can do so only within the ambit of the purposes for which it was created to eradicate. 35 P.S. § 1702. These purposes are disparate. The purposes of the DCA is to "cooperate with county, municipal and regional planning commissions ... community development groups and similar agencies created for

the purposes of aiding and encouraging an orderly productive and coordinated development of the state . . .", 71 P.S. § 1049.3a. It does not include the right to contract away the Commonwealth's inherent right as a sovereign to take private property and its right to commit the sovereign's faith and credit without specific legislative action. Yet, that is what occurred in this case.

The principle of separation of powers dictates that the powers of eminent domain and laws relating thereto, are created by the legislature, subject to the Executive's proposals and vetoes. The Pennsylvania courts' interpretation of 35 P.S. § 1709(i) violates the separation of powers doctrine and permits DCA, an arm of the executive branch, to vest additional eminent domain powers in the CCRA, something which only the Pennsylvania legislature may do.

The separation of powers doctrine, and our constitutional system of government require that the right to take private property be granted by the legislature only, ensuring that there is not an excessive concentration of power given to the executive branch. The CCRA is attempting to circumvent the constitutional checks and balances by claiming it has obtained broader eminent domain powers than it is legislatively vested with, through its contract with the DCA.

This Court has held that a distinction exists in the case of statutes which grant to others, such as public utilities (in this case a county's renewal authority) the right to exercise the power of eminent domain on behalf of themselves, and the Court held that those powers are by their very nature, limited. *United States v. Carmack*, 329 U.S. 230 (1946). The DCA cannot expand the limited powers granted to the CCRA by a contract which purportedly vests the CCRA with the sovereign's general powers of eminent domain.

Although the two parties, here DCA and CCRA, are free to contract, not every provision contained in such a contract is legal and enforceable. A contractual provision that undermines the legislature's exclusive authority to delegate eminent domain powers is illegal, unenforceable and unconstitutional.

Preliminary objections are the exclusive vehicle to challenge a declaration of taking in Pennsylvania. *Appeal of Conway*, 432 A.2d 276, 278 (Pa. Cmwlth. Ct. 1981). Preliminary objections challenging a declaration of taking are limited to the condemnor's power or right to condemn, sufficiency of security, any other procedure followed by the condemnor, or the declaration of taking. 26 P.S. § 1-406. Dismissing preliminary objections, that raise an issue of fact regarding the purpose for a condemnation and the adequacy of security is improper. *Appeal of Conway* at 278. Where the sufficiency of security is challenged by preliminary objections in a condemnation case the condemnee is entitled to a hearing and opportunity to present evidence. *Milford Traumbauersville Area Sewer Authority v. Approximately 0.753 Acres of Land*, 358 A.2d 450 (Pa. Cmwlth. 1976).

Petitioners first preliminary objection to the declaration of taking averred that the declaration of taking and the condemnation sought to be effectuated thereby were void because CCRA, as the agent of the DCA, acted ultra vires of its powers and the authority vested in it pursuant to the Urban Redevelopment Law of Pennsylvania. Clearly, the CCRA had acted ultra vires of its authority and could not exercise the broad powers of eminent domain legislatively vested in the DCA. Petitioners preliminary objections should have been sustained and the declaration of taking and the condemnation sought to be effectuated should have been declared void.

II.

AN EVIDENTIARY HEARING WAS CONSTITUTIONALLY REQUIRED TO DETERMINE IF THE THREAT OF THE UNDERGROUND MINE FIRE STILL EXISTED AND TO DETERMINE IF THERE WAS REQUISITE SECURITY COMMITTED.

Petitioners asserted by their preliminary objections that the CCRA failed to secure the taking sought to be effected in violation of the United States and Pennsylvania Constitutions and the Pennsylvania Eminent Domain Code and that while their property might have been endangered by the underground mine fire in 1983 when federal funds had been appropriated their property was not so endangered when it was condemned in 1993, some ten years later.

Article I, Section 10 of the Pennsylvania Constitution provides, in part that:

> . . . private property (shall not) be taken . . . without just compensation being first made or secured.

In this case, the Pennsylvania courts held that the CCRA was not required to secure the taking here involved because it was acting as the agent for the DCA and, as such, could commit Pennsylvania's power to levy and collect taxes in lieu thereof. The trial court stated that ". . . in the instant case the condemner in fact, *though not in law*, possesses albeit indirectly, the power of taxation and therefore no bond needs to be filed with the declaration of taking." (Emphasis added) (App., *infra*, 19a). Similarly, the Opinion of the Pennsylvania Commonwealth Court also contains a brief reference to the alleged power of

taxation "in fact" yet not "in law", by simply holding that ". . . the Columbia County Redevelopment Authority as an agent of the Department of Community Affairs, is backed by the taxing power of the Commonwealth, through the Department of Community Affairs, a Commonwealth agency." (App., *infra*, 10a). Neither court construed Pennsylvania law to afford the CCRA the right to levy and collect taxes. The sole question, therefore, is whether the CCRA can commit the Commonwealth's power to levy and collect taxes as the agent of one of its departments, the DCA.

Section 1-403b of the Pennsylvania Eminent Domain Code, 26 P.S. § 1-403b provides, quite unambiguously that:

> Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. . . .

There are no provisions in the Pennsylvania Constitution or the statutes of Pennsylvania that give the CCRA taxing power. Further, it has been judicially determined that redevelopment authorities in Pennsylvania, such as the CCRA do not have taxing power. *In re City of Scranton*, 572 A.2d 250 (Pa. Cmwlth. 1990), *petition for allowance of appeal denied*, 590 A.2d 760 (Pa. 1990); *Taking in Eminent Domain of Certain Parcels of Real Estate*, 349 A.2d 781 (Pa. Cmwlth. 1976).

Indeed, the Commonwealth Court recognized the weakness of this "taxing power" reasoning, holding that, "[T]his court has held that even though a condemnor does not have the power to tax, where sufficient funds are available from other sources to cover the costs, condemnation constitutes sufficient surety that a bond does not have to be filed." (App., *infra*, 10a).

In the case *sub judice*, petitioners had requested an evidentiary hearing, not on the issue of blight, as was erroneously

stated by the Commonwealth Court (App., *infra*, 9a), but on the issue of whether there were funds to secure the taking, if it was effectuated.

The contract between the DCA and the CCRA provides that:

> . . . funds are available for the acquisition of private homes, businesses and non-profit buildings and for the relocation of people in the Borough of Centralia . . . which properties are threatened by an underground mine fire . . .

If the petitioners' property was not threatened by an underground mine fire, then, according to the terms of the contract, no funds would be available to pay them just compensation for the taking of their property by eminent domain. Petitioners asserted below that the underground mine fire had burned through the coal under their property, and could not now burn back and endanger their property as there was no longer any combustible materials to fuel the fire. An evidentiary hearing was, therefore, required to determine if the subject condemned property was, in fact, threatened. If the property was not endangered, funds to secure the taking were not available; without security being posted by the CCRA, petitioners would be without recourse and would be unable to obtain the just compensation for their properties since the CCRA did not have the power to levy and collect taxes.

In Pennsylvania, preliminary objections are the exclusive vehicle to challenge a taking. *Appeal of Conway*, 432 A.2d 276, 278 (Pa. Cmwlth. Ct. 1981). Petitioner filed preliminary objections, which averred, *inter alia*, that the declaration of taking and the condemnation sought to be effectuated thereby were void as they constituted a taking without proper security.

The CCRA did not file a bond or otherwise secure the declaration of taking. The Pennsylvania courts held that the CCRA could proceed with the subject condemnation, nevertheless, as sufficient funds were available per the contractual provisions, referring to the availability of federal funds. However, the availability of such funds was contingent upon the subject property being threatened by the underground mine fire. An evidentiary hearing was governed by the contract and was required, at the very least, to determine if funds would be available to provide petitioners with just compensation.

The adoption of an urban renewal plan is a legislative act which must be upheld if there is any public purpose underlying it, but the means of executing the project are for the legislature once a public purpose has been found. *Berman v. Parker,* 348 U.S. 26 (1954). In this case, without an evidentiary hearing to determine whether the underground mine fire threatened the subject condemned property as of the date of the taking, it is impossible to know if a public purpose for the project exists and if funds would be available to compensate petitioners if the subject taking was effectuated.[4]

Petitioners' due process rights under the United States and Pennsylvania Constitutions were violated when the Pennsylvania Courts refused condemnees' request for an evidentiary hearing on the issue of security and whether the threat of an underground mine fire existed as of the date of taking in 1993.

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4. The Pennsylvania Commonwealth Court held that the petitioners had failed to raise the issue of whether a threat of an underground mine fire exists in their preliminary objections (App., *infra,* 9a). This determination is unfounded and incorrect. Petitioners raised the issue of insufficient security in two of their preliminary objections, and requested an evidentiary hearing on whether the property in question was threatened by the underground mine fire. Preliminary Objections need not set forth every fact supporting the objections, but must only raise the applicable objections to the declaration of taking as here they did.

CONCLUSION

The CCRA was not legislatively vested with the power to take petitioners' property by the right of eminent domain. Petitioners were entitled to an evidentiary hearing to determine whether the underground mine fire was a threat to their property, and if, therefore, funds were available to compensate them. The failure of the Pennsylvania court to afford petitioners a hearing was constitutionally violative.

Respectfully submitted,

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Counsel of Record
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(215) 735-9090

Dated: December 26, 1995

APPENDIX A — ORDER DENYING PETITION FOR ALLOWANCE OF APPEAL DATED SEPTEMBER 27, 1995

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 414 E.D. Allocatur Dkt. 1995

IN THE MATTER OF CONDEMNATION OF THE SURFACE OF THAT CERTAIN TRACT OF LAND IN THE BOROUGH OF CENTRALIA, COLUMBIA COUNTY, PENNSYLVANIA

Petition of: Betty Noble, William P. Noble and Bonnie Hynoskie.

Petition for Allowance of Appeal from the order of the Commonwealth Court

ORDER

PER CURIAM:

AND NOW this 27th day of September, 1995, the Petition for Allowance of Appeal is DENIED.

Mr. Justice Montemuro is sitting by designation.

TRUE COPY FROM THE RECORD
Attest: 9/27/95

s/ John W. Person
John W. Person, Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania
Eastern District

APPENDIX B — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED DECEMBER 6, 1994

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 655 C.D. 1994

IN THE MATTER OF THE CONDEMNATION OF THE SURFACE OF THAT CERTAIN TRACT OF LAND LOCATED IN THE BOROUGH OF CENTRALIA, COLUMBIA COUNTY, PENNSYLVANIA, AND DESCRIBED IN COLUMBIA COUNTY DEED BOOK 451 AT PAGE 899, IN THE OFFICE OF THE COLUMBIA COUNTY RECORDER OF DEEDS IN BLOOMSBURG, PENNSYLVANIA, AND FURTHER IDENTIFIED AS 436 TROUTWINE STREET, IN THE BOROUGH OF CENTRALIA, COLUMBIA COUNTY, PENNSYLVANIA, BY THE COLUMBIA COUNTY REDEVELOPMENT AUTHORITY, AS AGENT OF THE DEPARTMENT OF COMMUNITY AFFAIRS OF THE COMMONWEALTH OF PENNSYLVANIA, IN CONNECTION WITH THE ACQUISITION OF SURFACE RIGHTS TO CERTAIN REAL PROPERTIES THREATENED BY AN UNDERGROUND MINE FIRE LOCATED IN AND AROUND THE BOROUGH OF CENTRALIA AND THE TOWNSHIP OF CONYNGHAM, COLUMBIA COUNTY, PENNSYLVANIA

BETTY NOBLE, WILLIAM P. NOBLE and BONNIE HYNOSKI,

Appellants

ARGUED: December 6, 1994

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE SILVESTRI SILVESTRI, Senior Judge

Appendix B

OPINION BY JUDGE KELLEY FILED: April 28, 1995

Betty Noble, William P. Noble and Bonnie Hynoski (hereinafter collectively referred to as "Condemnees") appeal from an order of the Court of Common Pleas of Columbia County (trial court denying Condemnees' preliminary objections to the declarations of taking filed by the Columbia County Redevelopment Authority (CCRA) as agent of the Pennsylvania Department of Community Affairs (DCA). We affirm.

In 1983, the DCA and the CCRA initiated a program to voluntarily relocate residents of Centralia Borough (borough) due to an alleged threat to the public health and safety resulting from a fire in abandoned mine workings in the vicinity of the borough. The majority, but not all, of the residents chose to voluntarily relocate, sold their homes, and moved from the borough. A relatively small number of borough residents declined to relocate and continued to reside in the borough.

On February 18, 1992, attorneys for CCRA notified the remaining residents of the borough that as the result of the continuing threat to the public safety posed by the mine fire, CCRA, as the agent for the DCA, would acquire all of the remaining occupied properties in the borough be exercising the DCA's power of eminent domain. Thereafter, DCA and CCRA executed a contract wherein CCRA agreed to act as DCA's agent in relocating and acquiring the property of the remaining residents, businesses, and non-profit organizations of the borough who would be required to move from the mine fire area. Reproduced Record (R.) at 6a-26a. After the execution of the contract between CCRA and DCA, the CCRA adopted a resolution to proceed, in accordance with its contractual responsibilities and obligations to DCA, with the acquisition, by

the initiation of eminent domain proceedings, if necessary, of the surface of all the remaining homes, business and non-profit buildings which were located with the borough. R. at 28a.

On January 28, 1993, the CCRA, as agent of the DCA filed declarations of taking with the trial court for the purpose of acquiring only the surface to certain parcels of real property threatened by the underground mine fire located in and around the borough. R. at 2a-4a. The CCRA declared that the statutory authorization for the condemnations was set forth at 71 P.S. § 1049.4.[1] *Id.* Further, the CCRA declared that just compensation for the condemnations was secured by the power of taxation of the Commonwealth of Pennsylvania. *Id.*

In response, Condemnees and numerous other remaining residents of the borough filed identical preliminary objections to the declarations of taking. The preliminary objections raised the following issues:

> 1. The declarations of taking and the condemnations sought to be effected thereby are void because the CCRA, as the agent of

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1. Section 4 of the State Planning Code, Act of May 20, 1949, P.L. 1608, *as amended*, 71 P.S. §§ 1049.1-1049.11.

Section 4 provides, in part, that:

> The Department of Community Affairs shall have the power, in the name of the Commonwealth, to exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such department has approved the initiation of a project.

the DCA, is acting ultra vires of it powers and the authority vested in it pursuant to and in accordance with the Urban Redevelopment Law, Act of May 24, 1945, P.L. 991, *as amended*, 35 P.S. §§ 1701-1719.1.

2. The declarations of taking and the condemnations sought to be effected thereby are void to the extent that the DCA is deemed to be the condemnor because it does not have the power or right to acquire the properties sought to be acquired by the exercise of the right of eminent domain.

3. To the extent the DCA is deemed to be the condemnor, the declarations of taking and the condemnations sought to be effected thereby are void because it has not been delegated the authority to acquire property by the exercise of the right of eminent domain by the Commonwealth.

4. The declarations of taking filed in this case and the condemnations sought to be effected thereby are void because they constitute a taking of property without due process of law and without proper security first being made in violation of the United States Constitution.

5. The declarations of taking and the condemnations sought to be effected thereby are void because they constitute a taking of property without proper security first being

> made in violation of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, Special Session, P.L. 84, *as amended*, 26 P.S. §§ 1-101 — 1-903, and the Pennsylvania State Constitution.

R. at 32a-38a.

Without conducting an evidentiary hearing, the trial court denied Condemnees' preliminary objections to the declarations of taking based upon the record, the briefs and oral argument. Condemnees now appeal to this court.[2]

On appeal to this court, Condemnees raise the following two issues: (1) Whether a trial court has jurisdiction to dismiss preliminary objections to a declaration of taking in an eminent domain case without conducting an evidentiary hearing or otherwise affording a condemnee the opportunity to present evidence in support of the preliminary objections where the preliminary objections raised disputed issues of fact; and (2) Whether a redevelopment authority created pursuant to the Urban Redevelopment Law has the right to commit the Commonwealth's power to levy and collect taxes to secure a taking of private property.

In support of its argument that the trial court should have conducted an evidentiary hearing, the condemnees assert that factual issues were raised in their preliminary objections.[3]

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2. This court's scope of review of a trial court's order dismissing condemnees' preliminary objections is limited to a determination of whether the trial court abused its discretion or committed an error of law. *Olson v. Whitpain Township*, 141 Pa. Commonwealth Ct. 270, 595 A.2d 706 (1991).

3. Section 406 of the Eminent Domain Code provides, in part, that "[i]f an issue of fact is raised, the court shall take evidence by depositions or otherwise." 26 P.S. § 1-406.

Appendix B

Specifically, condemnees contend that the preliminary objections challenge the taking on the grounds that the subject condemned premises was not endangered and therefore did not fall within the compass of the contract and its acquisition. Condemnees argue that there first must be a certification that the area is blighted within the meaning and compass of the Urban Redevelopment Law. Condemnees base this assertion on their contention that the CCRA, having been created pursuant to the Urban Redevelopment law, is empowered only to acquire by condemnation blighted property.

This court agrees that the CCRA was created pursuant to the Urban Redevelopment Law and that the law sets forth the authority for the CCRA to acquire blighted areas by eminent domain. *See* §§ 1-19.1 of the Urban Redevelopment Law, 35 P.S. §§ 1701-1719.1. This court also agrees that before the CCRA can acquire any property pursuant to the Urban Redevelopment Law, the area in question must first be certified as blighted. *Id.*

However, it is clear from the declaration of taking filed by the CCRA seeking to acquire the Condemnees' property by eminent domain that the CCRA was not acting pursuant to the Urban Redevelopment Law. The CCRA was acting as the agent of DCA and sought to acquire the Condemnees' property pursuant to section 4 of the State Planning Code which clearly gives the DCA the power, in the name of the Commonwealth, to exercise the right of eminent domain. 71 P.S. § 1049.4.

It is uncontradicted in this case that the CCRA was acting as an agent of the DCA when it filed the declarations of taking and that the CCRA had entered into a contract with the DCA to act as its agent for that purpose. It is well settled that the existence of the principal-agent relationship is determined by the agreement made by the parties defining the circumstances under which an

agent may act for the principal. *Burnatoski v. Butler Ambulance Service*, 130 Pa. Commonwealth Ct. 264, 567 A.2d 1121, *petition for allowance of appeal denied*, 527 Pa. 603, 589 A.2d 593 (1989). Implicit in this relationship is consent by the principal that one may act on his or her behalf and subject to his or her control. *Id.*

In the present case, the contract entered into between the DCA and the CCRA provides that the CCRA is empowered, as the DCA's agent, to acquire the properties threatened by an underground mine fire and to relocate those residents who will be required to move from the mine fire area. R. at 6a. In addition, the resolution adopted by the CCRA shortly after entering into the contract with DCA provides that the CCRA, as the agent for DCA, shall acquire the properties through eminent domain if necessary.

Accordingly, it is clear that the intent of the agreement between the CCRA and DCA was that the CCRA was empowered with the authority to act on DCA's behalf in acquiring the remaining properties through the DCA's power of eminent domain. Further, this court has not found any provision in the State Planning Code or the Urban Redevelopment Law which would prohibit the DCA, as an agency of the Commonwealth, from contracting with another agency of the Commonwealth, to act as the DCA's agent, to assist the DCA in carrying out its statutory duties and obligations. Nor is there any prohibition in the Urban Redevelopment Law which precludes the CCRA from acting as DCA's agent. Accordingly, the CCRA was not acting ultra vires of its powers and the authority vested in it pursuant to the Urban Redevelopment Law.

As the CCRA was not acting pursuant to the Urban Redevelopment Law there was no need for a certification that the

affected area was blighted. Accordingly, the trial court was not required to hold an evidentiary hearing pursuant to section 406 of the Eminent Domain Code to determine whether the area was in fact blighted within the meaning of the Urban Redevelopment Law.

Condemnees also contend that the trial court should have held an evidentiary hearing to determine whether the threat of the underground mine fire existed as of the date of condemnation because both the DCA and the CCRA are required to comply with the mandate of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. 42 U.S.C. §§ 4601-4655.[4] The trial court determined that this issue had been waived due to Condemnees' failure to timely raise it in their preliminary objections. A review of Condemnees' preliminary objections filed herein reveal that the trial court was correct in concluding that this issue was not raised; therefore, pursuant to section 406 of the Eminent Domain Code, the issue is waived as all preliminary objections must be raised at one time and in one pleading. 26 P.S. § 1-406(c).

Condemnees' final argument is that the trial court was required to hold an evidentiary hearing to determine whether there was constitutionally sufficient security. We disagree.

Pursuant to section 403 of the Eminent Domain Code, 26 P.S. § 1-403, where a condemnor has the power of taxation, it shall not

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4. The stated policy of this federal act is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of programs or projects undertaken by a Federal agency or with Federal financial assistance. 42 U.S.C. § 4625 (b). The primary purpose of the act is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons. *Id.*

be required to file a bond with the declaration of taking. Herein, the CCRA as an agent of the DCA, is backed by the taxing power of the Commonwealth through the DCA, a Commonwealth agency.

This court has held that even though a condemnor does not have the power to tax, where sufficient funds are available from other sources to cover the costs, condemnation constitutes sufficient surety that a bond does not have to be filed. *See In re City of Scranton*, 132 Pa. Commonwealth Ct. 175, 572 A.2d 250, *petition for allowance of appeal denied*, 527 Pa. 619, 590 A.2d 760 (1990) (citing *Taking In Eminent Domain of Certain Parcels of Real Estate by the Redevelopment Authority of the City of Bethlehem*, 22 Pa. Commonwealth Ct. 487, 491, 349 A.2d 781, 784 (1976)). In the present case, the federal government has made funds available to the Commonwealth under the provisions of the Federal Appropriations Act of 1984, P.L. 98-181, 97 Stat. 1153, 1294 (1983) for the acquisition of the property and for the relocation of people in the borough which are threatened by the underground mine fire. *See* R. at 6a; 65a.

Accordingly, the order of the trial court denying Condemnees' preliminary objections to the declarations of taking is affirmed.

s/ James R. Kelley
JAMES R. KELLEY, Judge

APPENDIX C — OPINION OF THE COURT OF COMMON PLEAS FILED FEBRUARY 17, 1994

IN THE COURT OF COMMON PLEAS
OF THE 26TH JUDICIAL DISTRICT
COLUMBIA COUNTY BRANCH
CIVIL ACTION LAW
No.: 185 of 1993

IN THE MATTER OF THE CONDEMNATION OF THE SURFACE OF THAT CERTAIN TRACT OF LAND LOCATED IN THE BOROUGH OF CENTRALIA, COLUMBIA COUNTY PENNSYLVANIA AND DESCRIBED IN COLUMBIA COUNTY DEED BOOK 451 AT PAGE 899, IN THE OFFICE OF THE COLUMBIA COUNTY RECORDER OF DEEDS IN BLOOMSBURG, PENNSYLVANIA AND FURTHER IDENTIFIED AS 436 TROUTWINE STREET, IN THE BOROUGH OF CENTRALIA, COLUMBIA COUNTY, PENNSYLVANIA, BY THE COLUMBIA COUNTY REDEVELOPMENT AUTHORITY, AS AGENT OF THE DEPARTMENT OF COMMUNITY AFFAIRS OF THE COMMONWEALTH OF PENNSYLVANIA, IN CONNECTION WITH THE ACQUISITION OF SURFACE RIGHTS TO CERTAIN REAL PROPERTIES THREATENED BY AN UNDERGROUND MINE FIRE LOCATED IN AND AROUND THE BOROUGH OF CENTRALIA AND THE TOWNSHIP OF CONYNGHAM, COLUMBIA COUNTY, PENNSYLVANIA

LEWIS KATES, ESQUIRE, and THOMAS J. NICKELS, ESQUIRE
ATTORNEYS FOR PRELIMINARY OBJECTORS BETTY NOBLE, WILLIAM P. NOBLE and BONNIE HYNOSKI
ROBERT SPEILMAN, ESQUIRE, AND JOSEPH G. FERGUSON, ESQUIRE, ATTORNEYS FOR COLUMBIA COUNTY REDEVELOPMENT AUTHORITY

Appendix C

OPINION

February 15, 1994, J. Naus

In 1983, the Commonwealth of Pennsylvania (Commonwealth), the Department of Community Affairs (DCA) and the Columbia County Redevelopment Authority (CCRA) initiated a program to voluntarily relocate residents of Centralia Borough due to an alleged threat to the public health and safety resulting from a fire in abandoned mine workings in the vicinity of the Borough. The majority, but not all, of the residents chose to voluntarily relocate, sold their homes, and moved from the Borough. A relatively small number of Borough residents declined to relocate and continued to reside in the Borough.

On February 18, 1992, attorneys for CCRA notified the remaining residents of the Borough that as the result of the continuing threat to the public safety posed by the mine fire, CCRA, as the agent for the Commonwealth, would acquire all of the remaining occupied properties in the Borough be exercising the Commonwealth's power of eminent domain (See 26 P.S. Section 1-101 et seq.) Pursuant to which CCRA forthwith proceed with the acquisition, by the initiation of eminent domain proceedings, if necessary, of the surface of all remaining homes, businesses and non-profit buildings which are located in Centralia." CCRA's Exhibit "B"

Since the enactment of the resolution CCRA, acting as the alleged duly authorized agent of DCA has filed Declarations of taking to acquire all developed property in the Borough of Centralia and to relocate all remaining residents.

In response, numerous remaining residents of the Borough (hereafter the "Condemnees") have filed Preliminary Objections

Appendix C

to the Declarations of Taking, docketed at the following numbers: 9-CV-93, 162-CV-93, 162-CV-93, 164-CV-93, 165-CV-93, 166-CV-93, 168-CV-93, 170-CV-93, 175-CV-93, 177-CV-93, 178-CV-93, 180-CV-93, 181-CV-93, 182-CV-93, 184-CV-93, 185-CV-93, 187-CV-93, 190-CV-93, 191-CV-93, 192-CV-93, 193-CV-93, 197-CV-93, 198-CV-93, 199-CV-93, 200-CV-93, 201-CV-93, 202-CV-93, 203-CV-93, 204-CV-93, 205-CV-93, and 206-CV-93.

Each of the Condemnees in those actions has filed identical Preliminary Objections. The Preliminary Objections raise the following issues:

1. The Declarations are void because CCRA is acting *ultra vires* of the powers vested in it pursuant to 35 Pa. C.S.A. §1701 *et seq.*;

2. The Declarations are void because the DCA does not have the power to acquire property by Eminent Domain;

3. The Declaration are void because DCA has not been delegated the authority to acquire property by Eminent Domain by the Commonwealth;

4. The Declarations are void because they constitute a taking of property without due process of law and without proper security first being made in violation of the United States Constitution, and

5. The Declaration are void because they constitute a taking without proper security

first being made in violation of the Eminent Domain Code as amended and the Pennsylvania Constitution.

The issues raised are now before this court for disposition. Each will be addressed seriatim.

Preliminary objections are the exclusive vehicle to challenge declarations of taking. *Appeal of Nordhoy*, 119 Pa. Cmwlth. Ct. 620, , 547 A.2d 867, 869 (1988). Preliminary Objections challenging a declaration of taking are limited to the condemnor's power or right to condemn, sufficiency of the security, any other procedure followed by the condemnor, or the declaration of taking, Id. at __, 547 A.2d at 869. See also 26 P.S. §1-406(a).

In their first preliminary objection, the plaintiffs contend that the Declaration of Taking and the condemnation sought to be effected thereby are void because CCRA, as the agent of the Department (of Community Affairs), is acting ultra vires of its powers and the authority vested in it pursuant to and in accordance with 35 P.S. §1701 et seq. We disagree.

Section 1709(D) of the Urban Redevelopment Law, (35 P.S. §1701 et seq) pertaining to the powers of an authority, provides that an authority shall have the power "To act as an agent of the state or federal government or any of its instrumentalities or agencies for the public purpose set out in this Act." One of the public purposes pursuant to the Act is "encouraging the provision of a healthful home [and] a decent living environment . . ." 35 P.S. §1702. Section 1702 further provides, "such purposes are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the

power of eminent domain." An Authority's powers of eminent domain are specifically set forth in 35 P.S. §1712, which states:

> Title to any property acquired by an Authority through eminent domain shall be an absolute or fee simple title, unless a lesser title shall be designated in the eminent domain proceedings. The Authority may exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, or the same class as the city or county in which such Authority is organized to operate. If any of the real property in the redevelopment area which is to be acquired has, prior to such acquisition, been devoted to public use, it may, nevertheless, be acquired by condemnation: Provided, that no real property belonging to a city, county or to the Commonwealth may be acquired without its consent. No real property belonging to a public utility corporation may be acquired without the approval of the Public Untility Commission.

In the instant matter, it is uncontradicted that CCRA is acting as an agent of the Commonwealth. Likewise, the record indicates that CCRA is acting on behalf of the Commonwealth to achieve one of the stated public purposes of the Urban Redevelopment Law, encouraging the provision of healthful homes and a decent living environment, which is to be accomplished through the acquisition of the remaining occupied dwellings in the Borough of Centralia and the relocation of the remaining residents of the

Borough to areas where active mine fires are not present. Finally, there it is clear that CCRA has the power to acquire the remaining occupied remaining residences through eminent domain proceedings. Accordingly, we find the plaintiff's argument that CCRA has acted ultra vires to be without merit.

In their second and third preliminary objections the plaintiffs contend that the Declarations of Taking are void because the DCA does not have the power to acquire property by eminent domain and that the Declarations are void because the DCA has not been delegated the authority to acquire property by eminent domain by the Commonwealth. We find the Plaintiffs contentions to be without merit.

While the right of eminent domain is exclusively in the sovereign, the legislature may delegate this power. *Appeal of Swidzinski*, 134 Pa. Comwlth. Ct. 330, 579 A.2d 1353 (1990). Pertinent to the matter now before this court, section 1049.4 of the State Planning Code, 71 P.S. §1049.1 et seq. Provides:

> The Department of Community Affairs shall have the power, in the a name of the Commonwealth, to exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such department has approved the initiation of a project. Title to any property acquired by the department through eminent domain shall be an absolute or fee simple title unless a lesser title shall be designated in the eminent domain proceedings. If any of the real

> property in the area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may nevertheless be acquired by condemnation: Provided, That no real property belonging to a city, county, borough, town or township, or to the Commonwealth, may be acquired without consent. No real property belonging to a public utility corporation may be acquired without the approval of the Pennsylvania Public Utility Commission.

71 P.S. §1049.4.

Clearly, pursuant to this section the DCA has been vested with the power by the Commonwealth's legislature to acquire property by way of eminent domain proceedings. Review of the record in the instant case, specifically the contract entered into between the Commonwealth of Pennsylvania through the DCA and CCRA condemnor's Exhibit "A", reveals that the Commonwealth has specifically delegated the authority to acquire the subject properties by way of eminent domain proceedings, evidenced by a duly authorized representative of the Commonwealth affixing his/her signature to the space so provided in the contract underneath the heading "Commonwealth of Pennsylvania Acting through the Department of Community Affairs." (Condemnor's Exhibit "A") For the foregoing reason, plaintiff's second and third preliminary objections are hereby dismissed.

In their fourth and fifth preliminary objection, the plaintiffs allege that the Declarations of Taking are void because the Declarations constitute a taking of property without due process

of law and without proper security first being made in violation of the United States Constitution, the Eminent Domain Code (as amended) and the Pennsylvania Constitution. We find these arguments meritless as well.

The fundamental requisite of due process is the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest and to assert before the appropriate decision-making body the reasons for such choice. *Trinity Episcopal School Corporation v. Romney*, 387 F. Supp. 1044, 1084 (1974) citing *Mullane v. Central Hanover Bank and Trust Co.*, 399 U.S. 306, 336, 70 S.Ct 654, 94 L.Ed 865 (1950). In the instanst case, all of the aforementioned fundamental requisites of due process were met. Initially, we note that the property to be acquired is being acquired for a public, not private purpose. In the instant case, the condemnor filed a Declarations of Taking and Notices(s) of Filing of Decartion(s) of Taking with the Prothonotary of Columbia County. Copies of the aforementioned documents and attachments thereto were served upon the plaintiffs as is required by 26 P.S. §1-405. The Declarations of Taking set forth all information required to be contained in a Declaration of Taking pursuant to 26 P.S. §1-402. Furthermore, argument on the instant matter was held before this court on May 14, 1993 where all parties were represented and heard. For the foregoing reasons, we conclude that no violation of the plaintiffs due process rights has occurred. See also *Vecchione v. Twp of Cheltenham*, 13 Pa. Comwlth. Ct. 260, 320 A.2d 853 (1974).

Section a-403(a) of the Eminent Domain Code, 26 P.S. §1-101 et seq states:

> (a) Bond. Except as hereinafter provided, every condemnor shall give security to effect

> the condemnation by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

However, Section 1-403(b) provides:

> (b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The finds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

In the instant case, it is conceded by all that CCRA is acting as an agent of the DCA, a Commonwealth Agency. The Commonwealth as we are all only too aware has the power of taxation.

In light of these facts, we conclude that for the purposes of section 1-403(b), in the instant case the condemnor in fact, though not in law, possesses albeit indirectly, the power of taxation and therefore no bond needed to be filed with the Declarations of Taking. Additionally, we note that the Federal Government has made funds available to the Commonwealth, the DCA, and CCRA for the acquisition of the private homes, businesses and non-profit buildings and for the relocation of the people in the Borough of Centralia and portions of Conyngham

Township, Columbia County. Under such circumstances, i.e. where sufficient funds are available from other sources (such as the Federal Government) to cover its costs, condemnation will constitute sufficient surety so that a bond will not have to be filed. *In Re City of Scranton*, 132 Pa. Commw. 175, 572 A.2d 256 (1990) app. denied __ Pa. __, 589 A.2d 204 (1992). For the foregoing reasons, we find that the Declarations of Taking do not violate the Eminent Domain Code's filing of security provisions.

Article I, Sec. 10 of the Pennsylvania Constitution, provides that "private property [shall not] be taken or applied to public use, without authority of law and without just compensation being first made or secured." In the instant case just compensation has first been secured by way of the Commonwealth's power of taxation, as well as through the allocation of funds by the Federal government for the projects completion. Accordingly, the Declarations of Taking are not violative of the just compensation provision of the Pennsylvania Constitution.

The Fifth Amendment to the United States Constitution provides in relevant part that "private property [shall not] be taken for public use without just compensation." As its language indicates, this provision does not prohibit the taking or private property, but instead places a condition on the exercise of that power. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 314, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987). In the instant case the condition placed on the taking of private property for public use, specifically jut compensation to be paid to any individual whose property is being so acquired has been satisfied through the securing by the Commonwealth of funds for the acquisition of private homes, businesses, and non-profit buildings in the Borough of Centralia and portions of Conyngham Township,

Columbia County. (Federal Appropriations Act of 1984, P.L. 98-181 [HR 3959], 97 Stat. 1153, 1294 (1983)., See condemnor's Exhibit "A"). Accordingly, since funds are available to compensate property owners in the Borough of Centralia and portions of Conyngham Township for the taking of their properties, we conclude that the Declarations of Taking are not violative of the Fifth Amendment of the United States Constitution, even though property owners affected by the relocation project have not actually received payment for their respective properties as of this date. For the reasons set forth herein, plaintiff's fourth and fifth preliminary objections are hereby dismissed.

Finally, we note that in a document titled "Memorandum of Law Sur Preliminary Objections to Declaration of Taking", the plaintiffs have raised issues challenging the eminent domain proceedings in the instant matter which were not raised by way of the preliminary objections filed by the plaintiffs on February 29, 1993. Section 1-406(a) of the Eminent Domain Code, 26 P.S. § 1-101 et seq provides:

> Within thirty days after being served with notice of condemnation, the Condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or the right of the condemnor to appropriate condemned property, unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by

> the condemnor; or (4) the declaration of taking. ***Failure to raise these matters by preliminary objection shall constitute a waiver thereof.*** 26 P.S. §1-406(a) (emphasis added.)

Section §1-406(b) further provides in pertinent part that "All preliminary objections shall be raised at one time and in one pleading." 26 P.S. §1-406(b). Therefore, any issues which the plaintiffs attempt to raise in their second memorandum which were not raised as part of their initial preliminary objections have been waived and need not be addressed. Consequently, we enter the following Order:

(2)

Supreme Court, U.S.
FILED
FEB 27 1996
CLERK

No. 95-1047

In The

Supreme Court of the United States

October Term, 1995

BETTY NOBLE, WILLIAM P. NOBLE and BONNIE HYNOSKI,

Petitioners,

vs.

COLUMBIA COUNTY REDEVELOPMENT AUTHORITY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

1. Are preliminary objections, filed pursuant to § 1-406(a) of the Eminent Domain Code of Pennsylvania, the exclusive method for challenging Declarations of Taking, and does a condemnee waive any objections not raised in that manner, and does the procedure established by § 1-406(a) comply with all constitutional requirements?

2. May the preliminary objections of a condemnee be properly dismissed without an evidentiary hearing, if those preliminary objections raise no factual issues, but rely solely on legal arguments?

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COUNTER-STATEMENT OF THE CASE

The Columbia County Redevelopment Authority ("CCRA"), *acting as the duly authorized agent of the Department of Community Affairs of the Commonwealth of Pennsylvania ("DCA")*, filed Declarations of Taking against the Petitioners ("Petitioners") in this case. The preliminary objections filed by the Petitioners raised only the following limited issues, all of which are solely legal in nature, and not based on any disputed questions of fact:

1. That the Declarations of Taking were void because CCRA was acting *ultra vires* of the powers vested in it pursuant to 25 Pa. C.S.A. § 1701 *et seq.;*

2. That the Declarations of Taking were void because DCA does not have the power to acquire property by Eminent Domain;

3. That the Declarations of Taking were void because DCA had not been delegated the authority to acquire property by Eminent Domain by the Commonwealth of Pennsylvania ("Commonwealth");

4. That the Declarations of Taking were void because they constituted a taking of property without due process of law and without the posting of property security, in violation of the United States Constitution; and

5. That the Declarations of Taking were void because they constituted a taking without the posting of proper security, in violation of the Eminent Domain Code, as amended, and in violation of the Pennsylvania Constitution.

These issues were the *only* issues raised by the Petitioners.

Along with their objections, the Petitioners filed a two-page Memorandum of Law Sur Preliminary Objections to Declaration of Taking (the "First Memorandum").

On March 24, 1993, the Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch, issued a Notice for Argument Court, which required that the briefs of the Petitioners be filed by April 15, 1993, and that the brief of CCRA be filed by April 30, 1993. On April 19, 1993, the Petitioners, in apparent recognition of the inadequacy of their original memorandum of law, filed another document entitled "Memorandum of Law for Preliminary Objections to Declaration of Taking" (the "Second Memorandum"). The Second Memorandum attempted to raise factual issues which had not previously been raised in either the Petitioners' preliminary objections or in their First Memorandum. In dismissing the Petitioners' preliminary objections, the Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch, based its decision, in part, upon the limited number of legal issues raised by the Petitioners in their preliminary objections.

The Petitioners then filed an appeal to the Commonwealth Court of Pennsylvania, which denied the appeal in an Opinion and Order dated April 28, 1995. In denying the Petitioners' appeal, the Commonwealth Court of Pennsylvania held, *inter alia*, that: (a) "*It is uncontradicted in this case that CCRA was acting as an agent of the DCA when it filed the declarations of taking and that CCRA had entered into a contract with the DCA to act as its agent for that purpose.*" Commonwealth Court Opinion at Page 6 (emphasis added); (b) No statutory provisions prohibited CCRA from acting as DCA's agent in filing the declarations of taking, and DCA was itself specifically statutorily empowered with the ability to condemn, and could and did lawfully delegate those powers to CCRA; and (c) Since

the Commonwealth has the power of taxation, CCRA, as the Commonwealth's agent, was not required to post a bond, pursuant to Section 403 of the Eminent Domain Code, 26 P.S. § 1-403. The Petitioners then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which denied the petition on September 27, 1995. The Petitioners' Petition for a Writ of Certiorari to this Court then followed.

SUMMARY OF ARGUMENT

The essential relevant legal issue in this case rests with Section 1-406(a) of the Pennsylvania Eminent Domain Code (the "Code"). Section 1-406(a) clearly states that objections to a declaration of taking which are not raised by timely preliminary objections are waived. The Petitioners raised only five limited legal issues in their preliminary objections. Based upon the explicit provisions of the Code, as well as the case law interpreting § 1-406(a), there is no question whatever that the Petitioners were precluded from trying to raise additional factual disputes in their Second Memorandum. The Petitioners attempted similar ploys with the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court, and with this Court as well. The factual matters raised by the Petitioners in their Petition are clearly and unquestionably irrelevant in this appeal. *None of the factual issues raised in the Petitioners' Petition was the subject of any timely preliminary objections to the Declarations of Taking, and those factual issues have therefore been waived.* Specifically, in their Petition to this Court, the Petitioners assert, on p. 22, that "Petitioners asserted below that the underground mine fire had burned through the coal under their property, and could not now burn back and endanger their property as there was [sic] no longer any combustible materials to fuel the fire." Petition for a Writ of Certiorari, at p. 22. In fact, the Petitioners did *not* make this assertion below. This assertion does *not* appear anywhere in the Petitioners' preliminary objections to the Declarations of Taking.

As to the five limited legal issues which the Petitioners did timely raise, those issues were all properly decided by the Pennsylvania Court of Common Pleas in a manner adverse to the Petitioners, and the Common Pleas Court's decision was properly upheld by the Pennsylvania Commonwealth Court. Specifically, the Petitioners maintained, in their preliminary objections, that CCRA had no power to act as DCA's agent in effectuating the condemnations, but § 1702 of the Urban Development Law of Pennsylvania, 35 P.S. Section 1701 *et seq.* (Purdon's 1993) (the "URL") clearly authorizes Pennsylvania's county redevelopment authorities to act as agents of the Commonwealth in order to accomplish various public purposes, including the provision of healthful homes and a decent living environment. Further, although the Petitioners argued that DCA had no power to condemn, DCA is clearly authorized by 71 P.S. § 1049.4 (Purdon's 1990) to exercise the power of eminent domain. Further, while the Petitioners argued that CCRA should have been required to post a bond, it is readily apparent that no bond was required, because CCRA was acting as an agent of DCA, the actual condemnor, and because § 1-403(b) of the Code plainly states that no bond is required if a condemnor has the power of taxation.

REASONS FOR DENYING THE WRIT

I.

PRELIMINARY OBJECTIONS FILED PURSUANT TO § 1-406(a) OF THE EMINENT DOMAIN CODE ARE THE EXCLUSIVE METHOD TO CHALLENGE THE DECLARATIONS AND ANY OBJECTIONS NOT SPECIFICALLY RAISED IN THAT MANNER ARE WAIVED.

In the second of their Reasons for Granting the Writ, the Petitioners assert, *inter alia*, that an evidentiary hearing was constitutionally required to determine if the threat of an underground mine fire still existed. Petitioners then argue that they raised this issue in their preliminary objections. Specifically, Petitioners state that they ". . . asserted by their preliminary objections that . . . while their property might have been endangered by the underground mine fire in 1983 when federal funds had been appropriated their property was not so endangered when it was condemned in 1993, some ten years later." Petition for a Writ, at p. 20. The assertion that Petitioners raised this issue in their preliminary objections is totally inaccurate, and it finds no support whatever in the record in this case. The Petitioners are apparently attempting to seduce this Court with myths and factual inaccuracies. The Petitioners did not allege, and could not prove, that their properties were no longer endangered by the mine fire, so they have apparently resorted to using their Petition as a mechanism for attempting to create "facts" which are simply not true. The Petitioners had an opportunity to raise any of these "facts" in their preliminary objections to the declarations of taking, and they elected not to do so. It is improper, and contrary to the specific provisions of Pa. R. A. P. No. 1115, for the Petitioners to attempt to raise such "facts" in their Petition.

In short, the Petitioners had every opportunity to obtain and present evidence, *had their preliminary objections raised any factual issues.* The relevant inquiry in this case is not whether the Petitioners had the right to obtain and present evidence, but whether or not that right was waived, and whether or not, on appeal, that right can somehow be magically resuscitated.

The real issue in this case is the scope of § 1-406(a) of the Code, which provides as follows:

> *Within thirty days after being served with notice of condemnation, the Condemnee may file preliminary objections to the declaration of taking.* The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or the right of the condemnor to appropriate condemned property, unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. *Failure to raise these matters by preliminary objection shall constitute a waiver thereof.*

26 P.S. § 1-406(a) (Purdon's Supp. 1992) (emphasis added); *In re Condemnation by Commonwealth of Pennsylvania, Department of Transportation (Bernstein Appeal),* 112 Pa. Commw. 368, 535 A.2d 1210, 1214 (1988); *app. denied,* 519 Pa. 656, 546 A.2d 60 (1988). The Code further provides that the preliminary objections "shall state specifically the grounds relied upon" and "shall be raised at one time and in one pleading." 26 P.S. § 1-406(b) and (c) (Purdon's Supp. 1992).

Accordingly, it is well recognized that objections which are not specifically raised by timely preliminary objections filed pursuant to § 1-406(a) of the Code are waived and may not be raised in pleadings or briefs filed beyond the time limit set forth in the Code. *See McCullough v. Commonwealth of Pennsylvania, Department of Transportation,* 134 Pa. Commw. 95, 578 A.2d 568, 571 (1990) (failure to raise issues in preliminary objections constitutes waiver); and *Bernstein Appeal,* 112 Pa. Commw. 368, 535 A.2d 1210, 1215 (1988), (issue which was not raised in preliminary objections may not be raised in pleadings filed beyond the thirty days permitted under § 1-406(a) of the Cod

In the present case, there is no dispute that the preliminary objections and First Memorandum of the Petitioners were filed within thirty (30) days of the filing of the Declarations of Takings. Moreover, there is no dispute that the Petitioners have attempted, through these documents, to raise five (5) limited legal issues. In their Second Memorandum filed on April 19, 1993, however, the Petitioners attempted to raise additional objections which were not raised as part of their preliminary objections.

For example, the Petitioners contend in their Second Memorandum that "[a]n issue now before the court is whether there has ever been a proper determination of danger from the mine fire concerning any of the properties." Second Memorandum at 1. Nowhere in their Preliminary Objections, however, did the Petitioners ever mention, much less argue, the issue of whether the subject properties are in danger from the mine fire. Accordingly, that issue was waived, and it could not be properly raised by the Petitioners for the first time in their Second Memorandum.

Similarly, the Petitioners attempted to raise an argument in their Second Memorandum that CCRA, in condemning the

subject properties, did not comply with "the Contracted prerequisites for so doing including those set forth in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601 *et seq.*" Second Memorandum at 2. The Petitioners then go on to cite the language of the Uniform Relocation Act at length. *See* Second Memorandum at 8-11. One searches the Preliminary Objections of the Petitioners in vain, however, for any mention of the Uniform Relocation Act or of any failure of CCRA to follow that Act or to live up to any contractual obligation imposed upon it by DCA. Once again, the failure of the Petitioners to specifically raise these issues in their preliminary objections constituted a waiver.

The Pennsylvania Common Pleas Court properly refused to allow the Petitioners to employ their Second Memorandum as a vehicle to raise new objections which they failed to raise in accordance with the specific and exclusive procedures provided for in the Code. The Pennsylvania Commonwealth Court specifically upheld this decision by the Pennsylvania Common Pleas Court. If the Petitioners believed that there was any merit to their arguments concerning the danger presented by the mine fire, the requirements of the Uniform Relocation Act, or the obligations of the contract between DCA and CCRA, they were bound to raise such arguments by timely-filed preliminary objections under the Code. Their failure to do so constitutes an unequivocal waiver of those claims. The purpose of requiring the Petitioners to file a memorandum of law is to allow the Petitioners an opportunity to offer legal argument to support the issues which they properly attempted to raise in their preliminary objections. However, the submission of briefs or memoranda cannot be utilized as a mechanism for circumventing the Code's strict requirement that timely preliminary objections are the exclusive method for challenging a declaration of taking. *See Bernstein Appeal,* 535 A.2d at 1215 (court will not allow

Petitioners to do indirectly what they are no longer permitted to do directly).

Accordingly, the Petitioners are incorrect when they argue that "[evidentiary hearings are required to establish that the properties subject to the declaration of taking are, in fact, threatened by the mine fire." Second Memorandum at 9. By failing to raise this purported issue of fact by a timely-filed Preliminary Objection, the Petitioners have waived any right to an evidentiary hearing on this factual issue. *See Bernstein Appeal,* 535 A.2d at 1215 (trial court need not conduct evidentiary hearing on factual issues not raised in timely-filed preliminary objections).

Moreover, even if the Pennsylvania Common Pleas Court were directed to consider the question of whether the subject properties are in fact threatened by the mine fire, the Petitioners have offered nothing to support their claim that CCRA made an improper determination on that issue. Condemnation presupposes that a condemnor exercised its considered judgment and discretion prior to the initiation of a formal action. *Westrick v. Approval of Bond of Peoples Natural Gas Co.*, 103 Pa. Commw. 578, 520 A.2d 963, 965 (1987). In reviewing an administrative decision to condemn, the Common Pleas Court is limited to determining whether the actions of the condemnor constitute fraud, bad faith or an abuse of discretion. *Downingtown Area School District v. DiFrancesco,* 125 Pa. Commw. 264, 557 A.2d 819, 820 (1989). There is a presumption that the acts of the condemnor are for the public good, and a Court may not substitute its own discretion for that of the administrative body. *Westrick,* 520 A.2d at 965-66. The burden of proving that the condemnor abused its discretion is on the party filing the preliminary objections, and that burden is a heavy one to meet. *Downingtown Area School District,* 557 A.2d at 820-21; *see also Westrick,* 520 A.2d at 966.

In the present case, the Petitioners offered nothing in their Preliminary Objections or supporting papers that gives the slightest indication that CCRA improperly exercised its discretion in determining that the subject properties were threatened by the mine fire. Indeed, nowhere did the Petitioners allege that CCRA acted fraudulently, in bad faith, or in abuse of its discretion. The Petitioners could not create an "issue of fact" merely by questioning CCRA's determination for the first time in their Second Memorandum, or in the Petition which they have filed before this Court. This conclusion is especially mandated in this case, since the Petitioners have failed to offer even a scintilla of support for their claim that the subject properties are not threatened by the mine fire.

In sum, by failing to assert the issues in timely preliminary objections, the Petitioners have waived any objections concerning: CCRA's determination that the subject properties were threatened by the mine fire; or the obligations imposed on CCRA by its contract with DCA; or the requirements of the Uniform Relocation Act. If the Pennsylvania Common Pleas Court or the Pennsylvania Commonwealth Court had allowed the Petitioners to raise these arguments by way of their Second Memorandum, the entire scheme and purpose of the Code's special procedures would have been defeated. This Court should similarly refused to entertain the Petitioners belated arguments at this time. This case does not involve any legitimate due process claims; to the contrary, the issue in this case is *waiver.* By failing to raise factual issues concerning the mine fire in their preliminary objections, the Petitioners clearly waived their right to a hearing on these issues.

II.

THE ISSUES RAISED IN THE PRELIMINARY OBJECTIONS OF THE PETITIONERS SOLELY CONSTITUTED LEGAL ARGUMENTS, WHICH THE COMMON PLEAS COURT PROPERLY DETERMINED WITHOUT AN EVIDENTIARY HEARING.

The language of § 1-406(e) of the Code states, in pertinent part, as follows:

> (e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. . . . If an issue of fact is raised, the court shall take evidence by depositions or otherwise.

26 P.S. § 1-406(e) (Purdon's Supp. 1992). It is well settled that, in light of this language, an evidentiary hearing is required only where there are disputed issues of fact. *Miller v. Commonwealth of Pennsylvania, Department of Transportation*, 91 Pa. Commw. 622, 498 A.2d 1370, 1372-73 (1985). Where there are no disputed facts, and the issues before the Court are purely legal, the Court may rule on preliminary objections without a hearing. *Id.*, 498 A.2d at 1373 (citing *Milas Appeal*, 36 Pa. Commw. 1, 387 A.2d 183 (1978)).

In the present case, the Petitioners raised five (5) objections as their Preliminary Objections. The first three (3) objections involve legal questions concerning the power of DCA and CCRA to condemn the subject properties. The last two (2) issues deal with the legal question of whether the CCRA, while acting as an agent for the Commonwealth, was required to post security as

part of these condemnations. The Common Pleas Court, accordingly, was able to resolve all of the Preliminary Objections raised by the Petitioners without the scheduling of a hearing. Moreover, as is set forth below, each of the five (5) objections raised by the Petitioners was without merit and was properly overruled by the Common Pleas Court.

A. In Condemning The Subject Properties, CCRA Was Acting Within The Powers Given To It By The Legislature.

In condemning the subject properties, CCRA was not exercising its eminent domain power to acquire any "blighted property" under Section 1712.1 of the URL. Accordingly, there was no need for the CCRA to have the subject properties declared "blighted" pursuant to the provisions of the URL. The Petitioners' continual attempts to raise this issue seem to have been designed to misdirect the focus of the Pennsylvania Common Pleas Court, the Pennsylvania Commonwealth Court, and this Court as well.

The Petitioners argue that the provisions of the URL limit the exercise of an authority's power of eminent domain only to areas that have been declared "blighted." In truth, however, the URL grants much broader powers of eminent domain to authorities. Indeed, Section 1712 of the URL gives authorities the power to:

> . . . exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such Authority is organized to operate. . . .

35 P.S. § 1712 (Purdon's 1993).

More important, the URL specifically empowers CCRA to "act as an agent of the State or Federal Government or any of its instrumentalities or agencies for the public purposes set out in [the URL.]" 35 P.S. § 1709(d). The "public purposes" set forth in § 1702 of the URL include "encouraging the provision of healthful homes [and] a decent living environment. . . ." 35 P.S. § 1702. Moreover, the URL specifically states that such purposes are "declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain." *Id.*

In the present case, there can be no dispute that CCRA entered into a valid contract with DCA, and that, in this contract, DCA delegated to CCRA the responsibility to acquire the remaining real estate located in the Centralia-Conyngham Township Mine Fire Project Area, as well as the responsibility to relocate the remaining families, individuals, businesses, and churches. *See* Contract between DCA and CCRA attached to each Declaration as Exhibit "A" (the "Contract"). The Contract further provides explicitly that CCRA, in carrying out these responsibilities, would be acting as an agent of the Commonwealth, and in the name of the Commonwealth. *Id.*

Thus, CCRA was duly authorized to act as an agent of DCA in implementing the plan to acquire the properties threatened by the mine fire and to relocate the displaced residents. Accordingly, CCRA was acting as an agent for a state agency for a public purpose as set forth in the URL — *i.e.*, the provision of healthful homes and a decent living environment. CCRA, therefore, was clearly acting in accordance with the powers granted to it by the URL.

B. DCA Was Invested With The Power Of Eminent Domain To Condemn The Subject Properties.

The Contract, in effect, delegated DCA's power of eminent domain to CCRA. Thus, as is set forth in the Declarations of Taking themselves, CCRA was exercising the power of eminent domain set forth in 71 P.S. § 1049.4 (Purdon's 1990). The provisions of § 1049.4 state as follows:

> The Department of Community Affairs shall have the power, in the name of the Commonwealth, to exercise the right of eminent domain in the manner provided by law for the exercise of such right by cities or counties, as the case may be, of the same class as the city or county in which such department has approved the initiation of a project. Title to any property acquired by the department through eminent domain shall be an absolute or fee simple title unless a lesser title shall be designated in the eminent domain proceedings. If any of the real property in the area which is to be acquired has, prior to such acquisition, been devoted to another public use, it may nevertheless be acquired by condemnation: Provided, That no real property belonging to a city, county, borough, town or township, or to the Commonwealth, may be acquired without its consent. No real property belonging to a public utility corporation may be acquired without the approval of the Pennsylvania Public Utility Commission.

71 P.S. § 1049.4 (Purdon's 1990).

DCA thus properly contracted with CCRA to carry out the acquisition of property and the relocation of residents in accordance with DCA's power to "coordinate and wherever provided by law to supervise or administer the various programs of State and Federal Assistance. . . ." 71 P.S. § 670.101 (Purdon's 1990). The funds for the acquisition and relocation program in Centralia were, of course, made available to the Commonwealth through the Federal Appropriations Act of 1984. Accordingly, there was no basis for any argument by the Petitioners that DCA did not have the power to condemn the subject properties or to delegate that power to CCRA.

C. Because CCRA Was Acting As An Agent For The Commonwealth With Respect To The Condemnations, It Was Not Necessary For CCRA To File A Bond.

The provisions of § 1-403(b) of the Code state as follows:

> (b) Power of Taxation. Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be deemed pledged and are hereby made security for the payment of the damages as shall be determined by law.

26 P.S. § 1-403(b) (Purdon's Supp. 1992). It cannot be disputed that CCRA was acting in this matter as the agent of DCA, an agency of the Commonwealth. The Commonwealth, of course, has the power of taxation. Moreover, the Federal Government has made funds available to the Commonwealth, DCA and CCRA for "the acquisition of the private homes, businesses and non-profit buildings and for the relocation of people in the Borough of Centralia and portions of Conyngham Township,

Columbia County, which properties are threatened by an underground mine fire" pursuant to the Federal Appropriations Act of 1984. The Federal Government, of course, also has the power of taxation.

Thus, CCRA, acting as the agent for the Commonwealth and with the full support of funds specifically appropriated by the Federal Government, was not required to file a bond in this case. It has been held that even though a condemnor itself does not have the power to tax, condemnation would constitute sufficient surety without a bond being filed where sufficient funds were available from other sources to cover costs. *In re City of Scranton,* 132 Pa. Commw. 175, 572 A.2d 250, 255-56 (1990), *app. denied,* 527 Pa. 131, 589 A.2d 204 (1991) (*citing Taking In Eminent Domain of Certain Parcels of Real Estate By the Redevelopment Authority of the City of Bethlehem,* 22 Pa. Commw. 487, 491, 349 A.2d 781, 786 (1976)). Accordingly, there was no merit whatever to the Petitioners' argument that CCRA should have been regained to file a bond.

CONCLUSION

The preliminary objections of the Petitioners were properly dismissed without hearing by the Pennsylvania Common Pleas Court, because those preliminary objections *did not raise any factual issues.* The Pennsylvania Common Pleas Court's decision was properly upheld by the Pennsylvania Commonwealth Court. The Petitioners' Petition for a Writ of Certiorari should be denied by this Court.

Respectfully submitted,

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